No. 14555

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and LEE ARENAS,

Appellants

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees

LEE ARENAS,

Appellant,

vs.

JOHN W. PRESTON, OLIVER O. CLARK and DAVID D. SALLEE,

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

Opening Brief of Appellant, Lee Arenas

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Opinion Below.

The Trial Court wrote no opinion.

Jurisdiction.

The appeal herein of Lee Arenas [Tr. 83] is from a portion of a final supplemental judgment and decree

entered August 23, 1954 [Tr. 73-78] awarding appellees, who were former attorneys for Lee Arenas, interest upon the principal sum previously awarded to them as attorney's fees and costs (without interest) by a final judgment and supplemental decree entered April 6, 1951 [Tr. 3-8], which prior judgment was affirmed upon appeal by this court on March 16, 1953 (*United States v. Preston, et al.,* No. 13103, 202 F. 2d 740) and became final 90 days thereafter (28 U. S. C. A., Sec. 2101). This appeal is also from a portion of the same supplemental judgment and decree which allowed and ordered paid to appellee, Preston, the sum of $468.19 together with interest to cover costs and expenses he had advanced and paid as attorney for appellant, Lee Arenas, in an entirely different action brought against the United States and Eleuteria Brown Arenas in the lower court as Civil No. 12356-Y and affirmed on appeal by this court (*Arenas v. U. S.,* 197 F. 2d 418).

The jurisdiction of the district court was invoked under 25 U. S. C., Sec. 345. The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1291.

Statement of the Case.

Appellees, as counsel for appellant, Lee Arenas, established his right to certain allotments in severalty to lands within the Palm Spring Indian Reservation in his own right and as heir at law of his deceased wife, Guadalupe (*United States v. Arenas,* 158 F. 2d 730) and thereafter, obtained in the district court the judgment and supple-

mental decree [Tr. 3-8] which became final 90 days after affirmance by this court on March 16, 1953 (*United States v. Preston, et al.,* 202 F. 2d 740). Neither such judgment nor the mandate of this court contained any provision for interest upon the principal sum awarded to appellees by the judgment and affixed as a lien upon the allotted lands of appellant, Lee Arenas. Thereafter, the district court made orders for judicial sale of the trust patented Indian lands [Tr. 8-14; 18-19 and 20-25].

Confronted with such orders, appellant, Lee Arenas, procured cash purchasers for some of his allotted lands and, with the consent and approval of the Secretary of the Interior and by stipulations of the interested parties and orders of the district court entered April 30, 1954 [Tr. 25-44], was permitted to consummate such sales and to deposit the entire proceeds thereof, less certain charges, into the registry of the lower court with the liens formerly imposed upon the lands sold being transferred to and imposed upon the deposited funds.

Because such orders for judicial sale included provisions for interest [Tr. 12-23], private sales were made in an amount sufficient to cover such interest together with interest upon such interest pending appeal to this court and the sum of $122,104.00 was paid into the registry [Tr. 49, Par. VI]. Coincident therewith, the previous orders for judicial sale were vacated and set aside by a stipulated order of the lower court [Tr. 44-45].

Thereafter, upon petition [Tr. 46-53] and over objection of the United States for itself and for appellant, Lee

Arenas [Tr. 57-61], the district court awarded interest at 7% per annum from October 6, 1951 upon the fee and costs of $90,258.67 allowed to appellees in the final judgment entered April 6, 1951 and ordered such interest paid from the deposited proceeds of the sale of the Lee Arenas allotted lands [Tr. 73-78].

In the same judgment and pursuant to the same petition, the district court awarded to appellee Preston alleged reimbursement of costs in the sum of $468.19 which said appellee had advanced and paid as attorney for Lee Arenas in the separate action in which Lee Arenas unsuccessfully challenged the administrative decision of the Secretary of the Interior that Eleuteria Brown Arenas was the adopted daughter of Lee and Guadalupe and, as such, entitled to share one-half of Guadalupe's allotment as her heir at law and the lower court further ordered that such sum together with interest thereon at 7% per annum from January 1, 1952 be paid to Preston from the deposited proceeds of the sale of the Lee Arenas allotted lands.

Thereafter, both the United States [Tr. 79] and Lee Arenas appealed [Tr. 83].

Questions Involved.

1. Was it error for the lower court to award and direct payment of the proceeds of sales of restricted Indian lands as interest?

2. Was it error for the lower court to award and direct payment of such funds for reimbursement of advances made for Lee Arenas in an entirely separate and different litigation?

ARGUMENT.

I.

The District Court Erred in Awarding Interest and Directing Payment Thereof Out of the Proceeds of the Sale of Restricted Indian Lands.

The judgment of April 6, 1951 [Tr. 3] and the judgment from which this appeal is taken [Tr. 73] were judgments against the United States of America as custodian of restricted funds which were the proceeds of sales of restricted, allotted, Indian lands, and such funds were clothed with immunity of the sovereign from the exaction of interest. Therefore, it was error for the lower court to award and direct payment from such funds as interest. This court has established as the law of this case the fact that the United States was a necessary party defendant to appellees' claims and that their judgments were against it.

Arenas v. Preston, 181 F. 2d 62, 68-69;

United States v. Preston, 181 F. 2d 69, 70;

Cf. United States v. Hellard, 322 U. S. 363, 366.

When the judgment is against the United States or against funds which it holds in trust in its sovereign capacity or in which it has an interest, interest can not be awarded against it or from such funds without its express consent.

Huntley v. South Oregon Sales (C. A. 9, 1939), 104 F. 2d 153, 154;

Bramwell v. U. S. F. & G. (C. A. 9, 1924), 299 Fed. 705, 706, affd. 269 U. S. 483.

The case of *Anglin & Stevenson v. United States* (C. A. 10, 1947), 160 F. 2d 670, cert. den. 331 U. S. 834, is almost on all fours with this case and is controlling here.

There, as here, there were a long series of appeals. There, as here, there was a supplemental decree for attorney fees. There, as here, the restricted Indian funds were paid into the registry of the court. There, as here, the original judgment for attorney fees contained *no provision* for interest upon the principal sum. There, as here, the appellate court had decided that, since the United States had consented to be sued, or invoked the jurisdiction of the district court, that court had "full equity jurisdiction" (160 F. 2d 670, 672-181 F. 2d 62, 67). The only difference between the two cases is that the district court in the Oklahoma case had decided that interest could not be awarded and the lower court from whose judgment this appeal is taken has decided that interest can and should be awarded. We believe the following conclusions of the Tenth Circuit are unanswerable:

> "But, consent of the United States to be bound by a judgment does not amount to an express consent that such judgment shall bear interest. When the judgment was entered and became final, the equitable jurisdiction of the court was exhausted. The imposition of interest on the judgment was not a part of the equitable process to which the Government expressly consented to be bound. The final judgment was against the United States as custodian of restricted funds. It held these funds in trust for the Indian heirs in its sovereign capacity, and they thus became clothed with immunity from the exaction of interest."
>
> *Anglin & Stevenson v. U. S.*, 160 F. 2d 670, 673.

Aside from the fact that the judgment appealed from is against it, the United States is necessarily and adversely affected by such judgment by reason of its obligation as trustee. By the Mission Indian Act (Act of June 12,

1891, 26 Stat. 712, Sec. 5, quoted in 158 F. 2d 730, 734) the United States engaged to allot and convey these lands in severalty, free of encumbrances, to appellant, Lee Arenas upon the expiration of the trust period. To compel these sales and then use the proceeds to pay appellees, obligates the United States in performance of such trust to re-pay such amounts in order to fully perform such trust obligation. Hence, any increase in the amounts paid for interest becomes an increase in the ultimate obligation of the United States as trustee.

United States v. Rickert, 188 U. S. 432, 438;

Nathanson v. N. L. R. B., 344 U. S. 25, 28.

II.

The District Court Erred in Reimbursing Preston Out of These Restricted Funds in Payment for His Advances for Lee Arenas in an Entirely Separate Action.

United States v. Preston, 202 F. 2d 740, 742.

In fact, such advance by Preston merely created a personal, unsecured indebtedness from Lee Arenas to him which could not be enforced against Lee's restricted Indian property.

25 U. S. C. A., Sec. 410.

Conclusion.

Accordingly, it is submitted that the judgment of the district court should be reversed in respect to the matters appealed from.

Respectfully submitted,

Irl Davis Brett,

Attorney for Appellant Lee Arenas.